SUPREME COURT, U. S.

AUG 7 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 461

HARDY SALT COMPANY,
Petitioner,

vs.

STATE OF ILLINOIS et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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August 4, 1967.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Hardy Salt Company, petitioner, prays that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on May 22, 1967.*

* Plaintiffs in the District Court, respondents here, are the State of Illinois, the Illinois State Toll Highway Commission and the State of West Virginia, its agencies and subordinate municipalities. No longer in either of the actions here sought to be reviewed are the other defendants: Morton International, Inc. (Successor to Morton Salt Company) International Salt Company, Diamond Crystal Salt Company, Cargill Salt Company, American Salt Company and Cayuga Salt Company.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court (R. Vol. I, p. 99) printed in Appendix B hereto, *infra*, p. 22, is reported at 259 F. Supp. 35. The opinion of the Court of Appeals for the Eighth Circuit (R. Vol. II, Supp. p. 1) printed in Appendix A hereto, *infra*, p. 7, is reported in ... F. 2d ....

JURISDICTION.

The judgment of the Court of Appeals affirming the order of the United States District Court for the District Court of Minnesota was entered on May 22, 1967 (R. Vol. II, supp. p. 17). The jurisdiction of this Court is invoked pursuant to the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928, § 1254.

QUESTION PRESENTED.

Did the tolling provision of § 5 (b) of the Clayton Act which suspends the running of the statute of limitations during the pendency of government anti-trust proceedings and for one year thereafter toll the statute as to petitioner, a party named as co-conspirator but not as a defendant, in the government litigation.

STATUTES INVOLVED.

The statutes involved are § 4B of the Clayton Act, c. 283, § 1, 69 Stat. 283, 15 U. S. C., § 15 (b) and § 5 (b) of the Clayton Act, c. 283, § 2, 69 Stat. 283, 15 U. S. C., § 16 (b). The texts of those statutes are set forth in Appendix C hereto, *infra*, p. 54.

STATEMENT OF THE CASE.

On June 28, 1961, a grand jury sitting at St. Paul, Minnesota, returned an indictment in the United States District Court for the District of Minnesota, charging certain rock salt producers with violations of the anti-trust laws in the sale of salt to states, counties and municipalities for ice control purposes (R. Vol. I, p. 3). On July 11, 1961, the United States filed a civil complaint in the District Court for the District of Minnesota which alleged the same charge (R. Vol. I, pp. 4, 13-21). Named as defendants in each of said actions were Morton Salt Company, International Salt Company, Diamond Crystal Salt Company and Carey Salt Company (R. Vol. I, pp. 3, 4, 14). The government, in each of the actions, named American Salt Company, Barton Salt Company, Cargill, Inc., Cutler-Magner Company and Hardy Salt Company, petitioners here, as co-conspirators (R. Vol. I, pp. 3, 4, 15). No alleged co-conspirator was ever served with process in either the civil or criminal case and none ever entered an appearance therein or participated in the proceedings.

The criminal case was tried to a jury in the District Court for the District of Minnesota and resulted on June 7, 1962, in a verdict of not guilty (R. Vol. I, p. 5). Thereafter, Judge Nordbye entered an injunction adverse to Morton Salt Company and Diamond Crystal Salt Company in the civil case, which decree was affirmed in this Court on October 25, 1965, 382 U. S. 44 (R. Vol. I, p. 10). During the pendency of the civil action and prior to the District Court decree therein, International Salt and Carey Salt Company had entered into consent decrees (R. Vol. I, pp. 4, 6).

On October 13, 1964, the State of Illinois filed its first treble damage action against those four salt producers

who were the named defendants in both the criminal and civil actions brought by the United States (R. Vol. I, pp. 7, 57).

On August 23, 1966, the State of Illinois commenced its second (the instant) action against two additional rock salt producers and one rock salt distributor, petitioner, none of whom were parties to the earlier action brought by the State of Illinois or to either of the Federal government actions (R. Vol. II, pp. 3-12). The complaint filed in the District Court invoked the jurisdiction of that court under § 1 of the Sherman Act, c. 647, § 1, 26 Stat. 209, 15 U. S. C., § 1 and §§ 1, 4, 5, 12 and 16 of the Clayton Act, c. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, 15 U. S. C., §§ 12, 15, 16, 22 and 26 (R. Vol. II, p. 14). The same day the State of West Virginia filed its first treble damage action joining as defendants the four producers who were named as defendants in both government actions and the two additional companies including petitioner. The complaints filed by each of the states allege conspiracies extending through 1961, a date more than four years prior to the filing of said complaints (R. Vol. II, pp. 6, 18).

Petitioner moved to dismiss each of the actions against it on the ground that the complaint showed on its face that it was barred under the provisions of § 4 (b) of the Clayton Act. (15 U. S. C., § 15 (b), Appendix C, *infra*, 54) (R. Vol. II, pp. 25, 27).

To avoid the bar of the statute of limitations, respondents had pleaded the existence of governmental actions which actions had not terminated until less than one year prior to the filing of the actions here challenged and therefore were protected by the tolling provisions of § 5 (b) of the Clayton Act, 38 Stat. 731, 69 Stat. 283, 15 U. S. C., § 16(b) (R. Vol. II, pp. 9, 21).

In the instant proceedings the trial judge concluded that the pendency of the civil litigation had tolled the action as to Hardy. It overruled Hardy's motions to dismiss (R. Vol. II, pp. 29-31).

The trial court, pursuant to § 1292 (b) of the Judicial Code, 28 U. S. C., certified the question of the plea of limitations to the Court of Appeals for the Eighth Circuit (R. Vol. II, p. 30).

The Court of Appeals for the Eighth Circuit affirmed the order of the District Court (Vol. II, supp. p. 17).

REASONS FOR GRANTING THE WRIT.

The opinions in this case are the only reported decisions which hold that § 5 (b) of the Clayton Act suspends the running of the statute of limitations to one who is not a party in the governmental action to enforce the anti-trust laws. The opinion and judgment of the Court of Appeals sought to be reviewed conflict with the opinion and judgment of the Court of Appeals for the Seventh Circuit in *Sun Theatre Corporation v. RKO Radio Pictures, Inc.*, 213 F. 2d 284, 292 (1954), and the decision of the Court of Appeals for the First Circuit in *Momand v. Universal Film Exchange, Inc.*, 172 F. 2d 37, 48 (1948), cert. denied 336 U. S. 967.

The decision of the district court in the instant case which was affirmed by the Court of Appeals is contrary to the opinions of the District Court for the District of Utah in *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446, 455 (1951), the District Court for the Northern District of California in *Levy v. Paramount Pictures, Inc.*, 104 F. Supp. 787, 789 (1952), the District Court for the Western District of Missouri in *Electric Theatre Co. v. 20th Century-Fox F. Corp.*, 113 F. Supp. 937, 945 (1953), and the District Court for the Southern District of New York in *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 761 (1953).

The decisions of the District Court and the Court of Appeals in the instant case purport to be based on the decisions of this Court in *Minnesota Mining v. New Jersey Wood F. Co.*, 381 U. S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965). Neither of those cases, however, involves the question presented for review here.

The question is one of continuing importance in the administration of the anti-trust laws of the United States. Subsequent to the decision of the District Court in the instant case but before judgment was rendered by the Court of Appeals, the District Court for the District of New Jersey in *The State of New Jersey v. Morton Salt Company, et al.*, Civil No. 687-65, rendered a decision and judgment contrary to that of the District Court and the Court of Appeals here. That decision and order have been appealed to the Court of Appeals for the Third Circuit, being Causes Nos. 16,397, 16,398, 16,399, 16,517, 16,518 and 16,519 in that court. Briefs have been filed and the appeal is scheduled for oral argument in that Court in the early fall of 1967.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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August 4, 1967.

APPENDIX

APPENDIX A.

Opinion of the Court of Appeals
For the Eighth Circuit.

Hardy Salt Company,

Appellant,

State of Illinois, et al.,

Appellees.

Before Matthes, Blackmun and Mehaffy, Circuit Judges.

Matthes, Circuit Judge.

These are interlocutory appeals under 28 U. S. C., § 1292 (b) to review an order of the district court holding that the four-year statute of limitations applicable to private antitrust treble damage actions under Section 4B of the Clayton Act was tolled under Section 5 (b) of that Act,[1] as to Hardy Salt Company by reason of the pendency of government litigation against other members of the salt industry. The sole question for determination here is whether the tolling provision of Section 5 (b) of the Clayton Act, which suspends the running of the statute of limitations during the pendency of government

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[1] Section 5 (b) of the Clayton Act, 38 Stat. 731 (1914), *as amended*, 15 U. S. C., § 16 (b) (1963), provides:

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

antitrust proceedings, and for one year thereafter, tolls the statute as to a party named as a co-conspirator, but not as a defendant, in the government litigation. The district court held in favor of the plaintiffs, appellees herein, and Hardy Salt Company duly prosecuted its appeal. The denial of appellant's motions to dismiss was premised on the court's opinion reported at 259 F. Supp. 35 (D. Minn. 1966).

These private antitrust actions emanate from civil and criminal proceedings instituted by the government to punish and restrain a conspiracy among rock salt producers and distributors to fix prices of rock salt sold to various state and municipal agencies. The indictment, filed June 28, 1961, and the government civil action, filed July 11, 1961, named as defendants Morton Salt Company, Diamond Crystal Salt Company, International Salt Company and Carey Salt Company. Named as co-conspirators, but not as defendants in the government proceedings, were five other companies, including appellant, Hardy Salt Company.[2]

A jury trial in the criminal case resulted in an acquittal of the three litigating defendants on June 7, 1962. The government civil suit, however, terminated in a judgment against Morton and Diamond, which was affirmed on appeal to the Supreme Court on October 25, 1965. *Morton Salt Co. v. United States,* 382 U. S. 44 (1965). On August 23, 1966, subsequent to the filing of Judge Larson's opinion on July 28, 1966, but within one year of the Supreme Court's decision in *Morton Salt,* appellees filed their respective actions against appellant, Hardy.

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[2] A number of the defendants in the private antitrust actions prosecuted appeals from various adverse rulings of the district court. After the cases had reached this Court, however, all of the appeals were dismissed by consent of the parties, except the two here under consideration.

On the basis of the foregoing facts, the district court determined:

1. That the four-year statute of limitations applicable to plaintiffs' actions commenced to toll under Section 5 (b) on June 28, 1961, the date on which the government initiated the criminal action against certain named defendants.

2. The tolling of the statute of limitations terminated under Section 5 (b) on October 25, 1966, one year after the cessation date of all government litigation.

3. Section 5 (b) applies to all defendants named in the private treble damage actions although they were not named as defendants in the government litigation.

4. The matters complained of in plaintiffs' treble damage actions are based in whole or in part on the government proceedings within the meaning of Section 5 (b).

Inasmuch as appellees' causes of action against Hardy were not filed until August 23, 1966, all of their claims will be barred by the four-year statute of limitations, unless that limitation period was suspended during the pendency of the government litigation, and for one year thereafter. For the reasons set forth below, we sustain the district court's determination and affirm.

Appellant advances several arguments in support of its position that Section 5 (b) does not serve to toll the statute of limitations as to persons who were not defendants in the government litigation.

(1) The district court's ruling is contrary to a long line of decisions holding that the tolling provision of Section 5 (b) does not apply to non-government defendants;

(2) The district court's decision is inconsistent with the legislative history of the tolling provision;

(3) The Supreme Court's interpretations of Section 5 (b), as announced in *Minnesota Mining & Manufactur-*

ing Co. v. New Jersey Wood Finishing Co. (3M), 381 U. S. 311 (1965), and *Leh v. General Petroleum Corp. (Leh)*, 382 U. S. 54 (1965), do not warrant the conclusions reached by the district court;

(4) The construction of the statute by the district court would create confusion, uncertainty and unfairness regarding the rights of non-parties to the government litigation.

The district court carefully considered and rejected appellant's contentions. The court concluded that although the Supreme Court had not "explicitly passed upon the question raised here, the broad interpretation given § 5 (b) in *Leh* and *3M* suggests that the Supreme Court would hold that it tolls the statute on a cause of action asserted against a non-Government defendant; * * *." 259 F. Supp. at 53-54.

Appellant strenuously contends that the issue before this Court has been decided adversely to the conclusion of the district court by a uniform line of prior decisions.[3] All but two of these decisions are the outgrowth of prior government actions against certain producers and distributors in the movie industry. We agree with appellant that the holdings of these cases or the dicta therein are contrary to the position taken by Judge Larson and support the proposition that the tolling provision of Section 5 (b)

[3] We are cited to our opinion in *Columbia Pictures Corp. v. Charles Rubenstein, Inc.*, 289 F. 2d 418 (8th Cir. 1961), *affirming*, 176 F. Supp. 527 (D. Minn. 1959) and 154 F. Supp. 216, 218-19 (D. Minn. 1957). Contrary to appellant's intimation, however, we did not reach the suspension issue as to non-government defendants in the *Rubenstein* case. Appellant, however, cites several other Court of Appeals and District Court decisions as directly or inferentially supporting a result contrary to that reached by the district court. See, *e.g.*, *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 2d 284, 291-92 (7th Cir. 1954); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 172 F. Supp. 198, 200 (E. D. N. Y. 1959); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 945 (W. D. Mo. 1953); *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446, 454-55 (D. Utah 1951).

is inapplicable to parties who were not defendants in the government antitrust litigation. Despite this contrariety, however, we do not deem them to be controlling precedents in light of the *3M* and *Leh* decisions.

Each of appellant's movie theater cases was decided under Section 5 of the Clayton Act, the progeny of the present days Sections 5 (a) and 5 (b).[4] It is apparent, however, that these decisions construed the tolling provision of the second paragraph of Section 5 [the present Section 5 (b)] as coextensive with the collateral estoppel principles applicable to the first paragraph of Section 5 [the present Section 5 (a)], which gave prima facie effect to a final judgment or decree in the government proceeding against named defendants in that litigation. The tolling provision of that Section, as to private rights of action based in whole or in part on matters at issue in the government proceeding, was construed as having no greater reach than the evidentiary provisions of Section 5,

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[4] Section 5 of the Clayton Act of 1914, 38 Stat. 731, provided:

"That a final judgment or decree hereafter rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided*, This section shall not apply to consent judgments or decrees entered before any testimony has been taken; *Provided further*, This section shall not apply to consent judgments or decrees rendered in criminal proceedings or suits in equity, now pending, in which the taking of testimony has been commenced but has not been concluded, provided such judgments or decrees are rendered before any further testimony is taken.

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding shall be suspended during the pendency thereof."

and was not extended to protect other benefits accruing from related government proceedings. See, *e. g., Charles Rubenstein, Inc. v. Columbia Pictures Corp., supra,* at 218-19.

Typical of this judicial engrafting is *Sun Theatre Corp. v. RKO Radio Pictures, supra,* where the court circumscribed the scope of Section 5 in light of evidentiary features of that Section:

> "* * * Neither logic nor public policy considerations demand, or even permit, us to say that the pendency of a government antitrust suit operates to suspend the running of the statute [the Illinois statute of limitations] as to every party who participated, either locally or nationally, in the nationwide combination condemned thereby without regard to whether or not he was named therein as a defendant. Rather, the suspension provisions must be construed in the light of what can be accomplished thereby. Our hypothetical complaint charges and our hypothetical decree finds that A, B, C and D conspired together to eliminate competition on a national scale. The decree is prima facie evidence as to this question only. P [the private antitrust claimant] reaps the full benefit of Section 5 if the statute is suspended as to the parties named. If a different result is desirable, provision for its promulgation is a function of the Congress, not of the Courts."
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> * * * * * * * *
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> "* * * Plaintiff concedes that the two paragraphs of Section 5 are complementary. As previously demonstrated, no public policy considerations require that the tolling provisions be more extensive than the evidentiary provisions which they are designed to protect * * *." 213 F. 2d at 291-92.

In summary, we can fairly conclude that all of the decisions relied upon by appellant were based on the premise, or relied on other decisions or concessions of counsel which in turn were based on the premise, that Sections 5 (a) and 5 (b) must be construed as coextensive. This basic premise, we believe, has been thoroughly discredited by the *3M* and *Leh* decisions.

Congress in 1955 amended Section 5 of the Clayton Act by substituting Subsection (a) for the first paragraph of that Section to provide that final judgments or decrees in government actions under the antitrust laws would be prima facie evidence in damage suits by the United States as well as in private damage suits. The second paragraph of that section was further amended by the substitution of Subsection (b) to extend the period of suspension for one year after the pendency of the government suit, and to require a private action to be commenced within that time or within four years after the cause of action had accrued.

Appellant would have us attach no particular significance to the substitution of Subsections 5 (a) and 5 (b) for Section 5 in view of the fact that Congress made no substantial change in the pertinent statutory language with respect to persons to whom the tolling provision was applicable, notwithstanding a uniform line of authority up to the time of the amendment. Appellant argues that Congress, had it intended to reach a result contrary to these prior decisions, would have explicitly altered the language of Section 5, and in not doing so, implicitly approved the judicial construction given to the tolling provision.

We find nothing in the language of the amendment itself or in its legislative history which evidences such an intention. Congress was concerned primarily with the confusion and discrimination inherent in the use of diverse state statutes of limitation and the undesirability of pro-

longing private actions by suspending the statute of limitations several years beyond the duration of the government antitrust action. S. Rep. No. 619, 84th Cong., 1st Sess. 4-5 (1955); H. R. Rep. No. 422, 84th Cong., 1st Sess. 6-7 (1955). See also *Christensen v. Paramount Pictures, Inc., supra.* Clearly, Congress did not concern itself with the application of the tolling provision of Section 5 (b) to parties who had withdrawn prior to the ultimate conclusion of the government litigation or to those defendants who were not named in the government action.

Nothing therefore in the Congressional history of the 1955 amendment impels us to the conclusion that Sections 5 (a) and (b) are to be construed as coextensive in their frame of reference. Even prior to the Supreme Court's decisions in *3M and Leh,* the Tenth Circuit in *Union Carbide and Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed,* 371 U. S. 801 (1962), had recognized the fallacy of construing Section 5 (b) solely by reference to Section 5 (a):

> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit. The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited."
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> "* * * [W]e do not think the tolling provisions of the second paragraph of Section 5 are confined to or governed by the evidentiary rules of estoppel, necessarily prevalent in the first paragraph." 300 F. 2d at 569-70.

3M, as appellant correctly observes, did not specifically present the issue of the applicability of Section 5 (b) to non-government defendants. The question before the Supreme Court was whether proceedings instituted by the Federal Trade Commission under Section 7 of the Clayton Act tolled the four-year limitation bar under Section 5 (b) to the same extent as judicial proceedings, and if so, was the claim of New Jersey Wood Finishing Company, the private plaintiff, "based in whole or in part on any matter complained of" in the government proceeding. One of the arguments advanced with respect to this issue was that the Commission proceedings could not have prima facie evidentiary effect under Section 5 (a) and consequently could not toll the statute of limitations under Section 5 (b). The Supreme Court explicitly rejected this interpretation, and held that the applicability of Section 5 (a) to Federal Trade Commission proceedings would in no way control the question whether those proceedings tolled the statute of limitations under Section 5 (b):

> "In our view, therefore, the two sections are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives. This makes § 5 (b) readily severable from § 5 (a). Even if we assumed *arguendo* that § 5 (a) is inapplicable to Commission proceedings—a question upon which we venture no opinion—that conclusion would be immaterial in our consideration of § 5 (b) and § 4B. Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. This construction will lend considerable impetus to that policy." 381 U. S. at 318.

3M, in our view, basically undermines the validity of appellant's theater cases by exposing the reasoning behind them. These courts clearly labored under the now discredited view that the scope of Section 5 (b) was to be

commensurate with the benefits accruing to a private litigant, under Section 5 (a). *3M* clearly rejects such a limitation, and indicates that other, perhaps more far-reaching, benefits may inure to the private litigant under Section 5 (b):

> "It may be, as Minnesota Mining contends, that when it was enacted the tolling provision was a logical backstop for the prima facie evidence clause of § 5 (a). But even though § 5 (b) complements § 5 (a) in this respect by permitting a litigant to await the outcome of government proceedings and use any judgment or decree rendered therein—a benefit which often is of limited practical value—it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of § 5 (b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132 (e). See generally 16 CFR § 1.131 *et seq.* Moreover, difficult questions of law may be tested and definitely resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties. * * *"
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> * * * * * * *
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> "* * * In this connection, and of crucial significance, is the fact that the potential advantages avail-

able to such litigants because of § 5 (b) reach far beyond the specific and limited benefits accruing to them under § 5 (a). * * *" 381 U. S. at 319-20.

Leh reaffirms *3M's* rejection of a coextensive treatment of Sections 5 (a) and 5 (b). The issue in that case centered around the question whether the conspiracy charged in the private suit was "based in whole or in part on any matter complained of" in the government proceeding, and would therefore toll the statute of limitations under Section 5 (b). In *Leh*, however, the situation was the converse of that presented here in that the private claimant failed to join two out of eight government defendants in his action for damages. The defendants contended, and the lower court so found, that this variance prevented resort to the tolling provision of Section 5 (b). The Supreme Court rejected the position that this difference necessitated a holding that the private action was not based in whole or in part on any matter complained of in the government proceeding, and explained the discrepancy on the following grounds:

> "Just as in *Minnesota Mining* the differences between Sherman Act and Clayton Act proceedings were held not to require the conclusion that the private action under the Sherman Act was not based in part on any matter complained of in the Government's § 7 suit, so here we cannot conclude that a private claimant may invoke § 5 (b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies. Here there is substantial identity of parties, six of the seven defendants in this case being defendants in the government suit as well. In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters

of which the Government complained. In the interim between the filing of the two actions it may have become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. *On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or co-conspirators in the Government's necessarily broader net.* The overlap in the time periods of which two conspiracies is less complete, but this disparity is equally without significance." 382 U. S. at 63-64 (Emphasis added).

This language, we believe, indicates the reluctance on the part of the Supreme Court to deprive a private plaintiff of the benefits accruing from a government action solely on the basis of the government's choice of defendants—a choice which may have no direct bearing on the plaintiff's selection of those defendants who have injured him. We agree with the district court that the difference in defendants named in the two actions may be wholly unrelated to the question of whether the private claim is based in whole or in part on the government suit. *Leh v. General Petroleum Corp., supra,* at 63.

While *3M* and *Leh* did not decide the precise issue before us, we believe the principles enunciated therein to be of controlling importance here. These decisions unequivocally support the proposition that Section 5 (a), which is applicable solely to named defendants in the government proceeding, is not to be treated as coextensive with Section 5 (b). Both decisions broadly interpret the scope of Section 5 (b) beyond the confines of Section 5 (a).

In light of such interpretation, Section 5 (b) by its clear and unambiguous language supports appellees' position. Unlike Section 5 (a),[5] Section 5 (b) on its face does not limit its applicability to named government defendants, but specifies that during the pendency of *any* government civil or criminal proceeding, "the running of the statute of limitations *in respect of every private right of action*" shall be suspended. We deem these textual distinctions significant as evincing the intention of Congress to give Section 5 (b) a more expansive interpretation than 5 (a). To hold otherwise, we feel, would effectively deny a plaintiff redress against those conspirators who may have directly and proximately contributed to his injuries. A suit prosecuted solely against the major government defendants as participants in a common conspiracy may well prove ineffective unless a plaintiff is able to localize his lawsuit and prove the impact of the national conspiracy on his enterprise. He must be able to link his damages to the activities of the principal conspirators, a difficult task at best without the intervention of those intermediate parties who may have directly affected his business. In short, we recognize that a plaintiff may be required to join parties other than the major offenders named in the government suit in order to secure full and adequate relief.

We feel, moreover, that our decision in this case will fully implement the clear Congressional intention under-

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[5] Section 5 (a) of the Clayton Act, 38 Stat. 731 (1914), *as amended*, 15 U. S. C., § 16 (a) (1963), provides:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that *a defendant* has violated said laws shall be prima facie evidence against *such defendant* in any action or proceeding brought by any other party against *such defendant* under said laws or by the United States under Section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto * * *" (Emphasis added).

lying Section 5 (b) that private parties be accorded the full benefits of prior government actions. *Minnesota Mining v. New Jersey Wood Co., supra* at 320. We are mindful of the Supreme Court's admonition in *3M* and *Leh* that Section 5 (b) should not be given a "grudging" and "niggardly" construction. Full realization of the benefits accruing from the government litigation may well depend upon tolling the applicable limitations period as to those conspirators who, for one reason or another, escaped unscathed from the government proceedings.

Appellant argues, however, that it would be unfair to toll the statute of limitations against an enterprise not a party to the government proceedings, since that enterprise would have no means of knowing that it would be subjected to private suits at some later date, and consequently have no reason to retain or collect evidence which would ultimately vindicate its position. Appellant contends Judge Larson's interpretation of Section 5 (b) would have the effect of suspending the statute of limitations as to non-government defendants for an unreasonable period of time. *Cf. Philco Corporation v. Radio Corporation of America,* 186 F. Supp. 155 (E. D. Pa. 1960).

We need not concern ourselves with the possibilities of a prolonged and unreasonable suspension period in the context of the present case. The force of appellant's argument quickly dissipates in view of the fact that it was a named co-conspirator in the government proceedings. We attach some significance to this designation, and believe it adequately put appellant on notice that it may have participated in the alleged conspiracy, and could be subject to private actions based on that conspiracy. In view of Hardy's position we find it highly unlikely that it was ill-prepared or unduly surprised at the possibility of a private suit based on the government conspiracy.

The unwary non-government defendant, moreover, who disavows all knowledge of the alleged conspiracy and who has actually played no part in it will be adequately protected by the saving feature of Section 5 (b). The tolling provision of that section will not continue to render him susceptible to private antitrust actions, unless the private plaintiff's complaint is "based in whole or in part on any matter complained of" in the government litigation. Appellant does not contend in this Court that there is lacking a substantial identity between the matters alleged in the government action and those alleged in the appellees' private actions.

Although Judge Larson held that Section 5 (b) tolled the running of the statute of limitations as to all non-government defendants, irrespective of whether they were designated as co-conspirators in the government litigation, the scope of our opinion is necessarily limited to the facts before us. We hold only that where a party has instituted a private antitrust action, based in whole or in part on a matter complained of in a prior government antitrust proceeding, against one named as a conspirator, but not as a defendant, in that proceeding, Section 5 (b) of the Clayton Act will toll the statute of limitations during the pendency of the government litigation, and for one year thereafter.

The order appealed from is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

Opinion of the U. S. District Court
of the District of Minnesota.

State of Michigan,

Plaintiffs,

vs.

Morton Salt Company, et al.,

Defendants.

Memorandum Decision.
(Filed August 1, 1966.)

In these consolidated treble damage antitrust actions this Court's Pretrial Order of November 23, 1965, directed the parties to brief and argue several questions concerning the application of § 5 (b) of the Clayton Act. Plaintiffs herein include the States of Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri and Wisconsin and various governmental units within these States, and in the Milwaukee class action governmental units from other States. Defendants are companies engaged in some aspect of the salt industry. They are American, Barton, Carey, Cargill, Cargo Carriers, Cutler-Magner, Diamond Crystal, Hardy, International and Morton.[1] These actions stem from criminal and civil antitrust proceedings by the United States against Carey, Diamond, International, and Morton Salt Companies. The Government action was based on an alleged conspiracy among the four named defendants,

[1] These cases have been consolidated pursuant to a national program for the handling of private treble damage suits arising out of the Government litigation involving the salt industry. Cf. Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A. B. A. J. 621 (1964). In the present cases, all defendants are not named in every complaint but in general the parties on either side are united in approach and will be referred to as a group, unless otherwise indicated. While some of these actions have been partially or completely settled, the issues determined herein still are relevant for some of the parts.

with other alleged coconspirators, to fix prices of rock salt sold to various State and local governmental entities for de-icing purposes.

Under § 5 (b) of the Clayton Act, a government antitrust proceeding serves to toll the statute of limitations on private treble damage suits.[1a] As originally enacted in 1914, § 5 (b) was part of a broader § 5 which included the present § 5 (a). The latter allows a final judgment or decree against a defendant in a Government proceeding to be used as prima facie evidence in a private treble damage suit.[2] Before the 1955 amendments, which segre-

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[1a] The Clayton Act provides in § 5 (b):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the anti-trust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Section 5 (b), 38 Stat. 731, as amended, 15 U. S. C., § 16 (b) (1964 ed.).

[2] The Clayton Act provides in § 5 (a):

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*: That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

Section 5 (a), 38 Stat. 731, as amended, 15 U. S. C., § 16 (b) (1964 ed.).

gated the prima facie provision from the tolling provision into subheadings (a) and (b), there was no Federal statute of limitations applicable to private antitrust actions. Congress, in 1955, amended the Clayton Act to provide, in § 4B, a four year limitations period.[3] In addition, the tolling section was amended to extend the period of suspension for one year following the conclusion of the Government lawsuit. A further change in the tolling provision was the substitution of "civil or criminal proceeding" for the phrase "suit or proceeding in equity or criminal prosecution." Apart from these changes, the basic structure of § 5 (b), and § 5 (a), remained unaltered from the 1914 enactment. As the Supreme Court indicated in *Minnesota Mining & Manufacturing Company v. New Jersey Wood Finishing Company,* 381 U. S. 311 (1965) [hereinafter cited as *3M*], ". . . the record of the 1914 legislative proceedings reveals an almost complete absence of any discussion on the tolling problem." 381 U. S. at 321. However, the Court noted that one basic intent underlying the tolling provision is outstanding—"the clearly expressed desire that private parties be permitted the benefits of prior government actions." 381 U. S. at 320.

Many of the issues raised in the present proceeding are not readily resolved by the plain language of § 5 (b), so this basic policy objective must be kept in mind in considering the following question: (A) When did the Government proceeding commence; and (B) when did it terminate? (C) What defendants in the present actions are subject to the tolling of § 5 (b); and (D) what plaintiffs

[3] 4B of the Clayton Act provides:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

Section 4B, 69 Stat. 283, 15 U. S. C., § 15 (b) (1964 ed.).

are benefited by that provision? Finally, there is the question of (E) whether the present actions are based in whole or in part on any matter complained of in the Government action.

(A) *Commencement of Government Action—*

Suspension of the period of limitations under § 5 (b) is inaugurated "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws. . . ." In early 1959 the Justice Department initiated an investigation of the salt industry and a grand jury empaneled in Springfield, Illinois, in May of that year did consider antitrust violations, as well as other matters. Apparently no formal action was taken by this jury before it was discharged. Subsequently, in February, 1960, another grand jury was convened in Springfield to investigate the salt industry, but no indictments were returned. Thereafter, in September, 1960, a third grand jury was convened in St. Paul, Minnesota. As a result of its investigation, indictments were filed on June 28, 1961, charging Morton, Diamond, International, and Carey Salt companies with violations of the antitrust laws.

In the *3M* case the Supreme Court was faced with the question of whether a proceeding by the Federal Trade Commission against the treble damage defendant served to toll the statute under § 5 (b) to the same extent as judicial proceedings. Holding that the F. T. C. action did suspend the limitations period, the Court rejected defendant's argument that since the Commission's Order could have no prima facie effect under § 5 (a), the tolling of § 5 (b) was equally inapplicable. Assuming, without deciding, that § 5 (a) also governs final Orders of the Com-

mission,[4] the Court made it clear that the two sections are not so intertwined that the scope of § 5 (b) is limited by § 5 (a).

Seeking the earliest possible date for tolling purposes, plaintiffs herein argue that if a Federal Trade Commission administrative proceeding can activate the tolling provision, *a fortiori* a grand jury deliberation tolls the statute, since it is a judicial proceeding. Despite the fact that the grand jury is part of the judicial process, and that a grand jury inquiry is "instituted" by the United States through its attorneys, differences between a grand jury hearing and the Commission action involved in *3M* lead to the conclusion that the statute was not here tolled by the grand jury deliberations in Illinois or Minnesota.

The statutory language is important. Section 5 (b) operates to suspend the statute of limitations when the United States institutes an action "to prevent, restrain, or punish violations of any of the antitrust laws . . ." The Commission proceeding against the *3M* defendant was instituted to prevent the creation of a monopoly and to restrain a threatened decrease in competition, due to an asset acquisition by Minnesota Mining, and resulted in a consent order pursuant to which defendant was required to divest itself of these assets. A grand jury proceeding, on the contrary, has no immediate or direct goal of punishment, prevention, or restraint. The Government's first step toward punishing violations of the antitrust laws may well be the institution of a grand jury hearing, as plaintiffs argue. However, this is an investigative phase,

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[4] At least one Court has held that FTC final orders to have prima facie effect under § 5 (a). See *Carpenter v. Central Arkansas Milk Producers Ass'n*, 34 U. S. L. Week 2677 (W. D. Ark., May 31, 1966). See also, Rockefeller, *The Supreme Court and the Private Anti-Trust Plaintiff*, 7 B. C. Com. & Ind. L. Rev. 279 (1966); Matteoni, *An Antitrust Argument. Whether a Federal Trade Commission Order Is Within the Ambit of the Clayton Act's Section 5*, 40 Notre Dame Law 148 (1965).

which could result in a determination that no punishment is needed. At oral argument, the Court suggested that the grand jury is more analogous to a Commission investigation which may precede the formal action of filing a complaint. Plaintiffs responded by analogizing the F. T. C. pre-complaint activity to an F. B. I. investigation preparatory to convening the grand jury. The grand jury must, nonetheless, be regarded as an investigative activity. Unlike the F. T. C. action with which *3M* was concerned, a grand jury hearing is not an adversary proceeding. In fact, it is conceivable that the potential defendant, as well as the prospective treble damage plaintiff, would have no knowledge that a grand jury had been convened.

Cases and statutes cited by plaintiffs to demonstrate that grand jury deliberations are "proceedings" are not relevant in the present context.[4a] The question presented here must be resolved in light of the particular legislative language and purpose. That a grand jury was held to be a "proceeding" within the scope of a statute granting immunity from prosecution based on testimony in any suit or proceeding, as in *Hale v. Henkel,* 201 U. S. 43 (1906), does not answer the question of whether it is a proceeding to prevent, restrain, or punish within the meaning of the statutory language, the matters complained of in the grand jury proceeding cannot be readily determined. As indicated by the Court in *3M*, the applicability of § 5 (b) in a particular treble damage action depends upon an analysis of the matters complained of in the Government proceeding and the private action. This was accomplished in *3M* by comparing the allegations of the Commission's complaint with those of the treble damage plaintiff. Since no formal complaint is filed to institute a grand jury hearing, it would be difficult to determine what matters were

[4a] *Levine v. United States,* 362 U. S. 610 (1960); *Marcus v. United States,* 310 F. 2d 143 (3rd Cir. 1962); 5 U. S. C., § 310.

complained of therein. This difficulty is recognized by plaintiffs to the extent that they relate the matters complained of in the Minnesota grand jury hearing to the indictment subsequently returned.

Another reason for holding that a grand jury proceeding is not within § 5 (b) is that it fails to serve the purposes of that section. In *3M* the Supreme Court indicated that ". . . the potential advantages available to . . . [private] litigants because of § 5 (b) reach far beyond the specific and limited benefits accruing to them under § 5 (a)." 381 U. S. at 320.

> "The Government's initial action may aid the private litigant in a number of other ways [apart from the prima facie effect of the judgment or decree]. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree." (Citations omitted.) 381 U. S. at 319.

These benefits do not flow from a grand jury deliberation. Although there are occasions when a private litigant may secure information about a grand jury hearing,[5] in general the proceedings remain veiled in secrecy. Moreover, the possibility does not exist that difficult questions of law will be resolved by the grand jury. These considerations, together with the factors discussed above, lead to the conclusion that the statute of limitations was not

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[5] See *United States v. Proctor & Gamble Co.*, 356 U. S. 677 (1958); *United States v. Pennsalt Chemicals Corporation*, 34 U. S. L. Week, 2454 (E. D. Pa. Feb. 3, 1966).

tolled for the present cases by virtue of the grand jury proceedings either in Illinois or Minnesota.

Alternatively, plaintiffs suggest that the statute was tolled as of June 28, 1961, the date the indictment was filed. No defendant has objected to this suggestion. Accordingly, the date which will govern the commencement of the tolling under § 5 (b) is June 28, 1961. This date is relevant for determining the first year for which plaintiffs may claim damages, if they can show an illegal conspiracy. Apart from § 5 (b), the damage period may be further extended if plaintiffs can show fraudulent concealment of the alleged conspiracy. Therefore, the date of June 28, 1961 may subsequently be affected by resolution of the issue of fraudulent concealment.

B. *Termination of Government Action*—

Under § 5 (b), the statute of limitations is tolled on every private right of action during the "pendency" of a Government proceeding, and for one year thereafter. To determine the timeliness of plaintiffs' respective actions, the termination date of the Government proceedings against some of the defendants herein must now be ascertained.

As indicated, the indictment charging Morton, Diamond, International, and Carey Salt Companies with conspiring to fix the price of rock salt was filed on June 28, 1961. Before the criminal trial commenced, Carey entered a plea of *nolo contendere* on March 26, 1962. Thereafter, the remaining three defendants proceeded to trial, which resulted in a verdict of not guilty rendered on June 7, 1962. Concurrent with the criminal action, a Government civil suit was also pending against these defendants. Although this action was commenced by a complaint filed on July 11, 1961, its progress was stayed during the trial of the criminal case. After the verdict in that action, the civil

suit was reactivated, resulting in a judgment against defendants Morton and Diamond, entered on November 24, 1964. Prior thereto, both International and Carey had entered into consent decrees, the latter on March 26, 1962; the former on November 4, 1963.[6] On February 19, 1965, the judgment against Morton and Diamond was amended, and was affirmed on appeal to the Supreme Court on October 26, 1965. *Morton Salt Company v. United States,* 382 U. S. 44 (1965).

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[6] The International consent decree originated with a stipulation filed on September 30, 1963, which allowed the Government to withdraw its agreement at any time within 30 days thereafter. That consent was not withdrawn and on November 4, 1963, a decree was entered, pursuant to the stipulation. Its effectiveness was stayed, however, for 30 days. Later, a stipulation and Order were filed stating that the decree was to be fully operative from January 5, 1964, except one paragraph, the effect of which was postponed until February 5, 1964. Counsel for International indicates that the two postponements were necessary to protect the company from being in contempt of the decree before its distribution system could be arranged to comply with the terms of that decree. The foregoing sequence of events has prompted disagreement between plaintiffs and International as to the effective date of the consent decree. International insists that it was binding on them at least as early as October 31, 1963, the date on which the Government's right to withdraw expired. Alternatively, it is argued that the decree was final on November 4, 1963. Plaintiffs reject both of these dates and suggest that the subsequent Order postponed the effectiveness of the decree at least until January 5, 1964. In addition, plaintiffs take an alternate position that the consent decree and judgment of November 4, 1963, could have no finality because Rule 54 (b), Fed. R. Civ. Proc., 28 U. S. C., requires an express determination by the Court that there is no just reason for delay in entry of judgment with respect to one party where multiple parties are involved. From this, plaintiffs contend that International's consent decree did not operate to conclude the action as to them so it continued to pend until a final judgment was entered which terminated the litigation as to all defendants. Plaintiffs take this same position with respect to Carey's consent decree. It is not necessary to consider the relationship of Rule 54 (b) to the statute of limitations, since there are other grounds to support the conclusion that the action continued to pend until October 26, 1965, for International and Carey despite their consent decrees. For a discussion of Rule 54 (b) in a related context see Comment, *Pendency and the Tolling of the Clayton Act,* 9 Stanf. L. Rev. 552 (1957).

Plaintiffs herein disagree with defendants as to when the foregoing actions ceased to pend for purposes of § 5 (b). Defendants Carey and International both argue that § 5 (b) requires a defendant-by-defendant analysis of the time when a Government suit ceases to pend. Under this approach, these defendants contend, the Government actions against them terminated with their respective consent decrees. Plaintiffs, on the other hand, urge that the proceedings must be considered as a unit, so that a Government action does not cease to pend against any one defendant until it is terminated with respect to all. Morton and Diamond share the view that the Government action terminated as to them with the verdict in the criminal case. They are opposed to plaintiffs' contention that the criminal and civil proceedings can be tacked together to toll the statute until the civil judgment was affirmed on appeal.

(1) *International and Carey*—In support of their position that the Government proceedings terminated with their consent decrees, International and Carey rely upon a line of cases decided after *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 70 F. Supp. 53 (S. D. N. Y. 1946), *aff'd in part, rev'd and remanded in part*, 334 U. S. 131 (1948), 85 F. Supp. 881 (S. D. N. Y. 1949), *aff'd per curiam*, 339 U. S. 974 (1950), a Government antitrust action against several companies in the motion picture industry.[7] That action began in 1938 and was finally resolved in 1950, but in the interim consent decrees were entered against some of the defendants at various times.[8] As treble

[7] The history and background of that litigation is contained in Conant, *Antitrust in the Motion Picture Litigation* (1960).

[8] "In *United States v. Paramount Pictures, Inc.*, for example the action was filed in 1938 and a consent decree entered against some of the defendants in 1940. Four years later, in August, 1944, the Government moved to modify the decree, seeking divorcement and divestiture, and the case was brought on for trial. After trial, appeal to the Supreme Court and remand, consent decrees were entered against one defendant

damage suits flourished following the Government action, the question of when the Government proceeding ceased to pend was a recurring problem.[9] Several courts resolved the question on a defendant-by-defendant basis. See *Union Carbide & Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed sub nom. Wade v. Union Carbide & Carbon Corp.,* 371 U. S. 801 (1963); *Sun Theatre Corporation v. RKO Radio Pictures,* 213 F. 2d 284 (7th Cir. 1954); *Grengs v. Twentieth Century Fox Film Corporation,* 232 F. 2d 325 (7th Cir.), *cert. denied,* 352 U. S. 871 (1956); *Skouras Theatres Corporation v. Radio Keith Orpheum Corporation,* 193 F. Supp. 401 (S. D. N. Y. 1961); *Manny v. Warner Brothers Pictures,* 116 F. Supp. 807 (S. D. Calif. 1953); *Electric Theatre Company v. Twentieth Century Fox Film Corporation,* 113 F. Supp. 927 (W. D. Missouri 1953); *Tague v. Balaban,* 146 F. Supp. 356 (N. D. Ill. 1956). While all of these cases looked to the termination date for an individual defendant, the most explicit holding and reasoning is contained in the

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in 1948, one in 1949, and against the remaining defendants in 1950. . . ."

Report of the Attorney General's National Committee to Study the Antitrust Laws, 382-83 (1955).

[9] The 1940 consent decree entered in the *Paramount* case was later reopened and the courts also had to determine whether this decree terminated the action. Holding that the Government proceedings were not terminated thereby, *Christensen v. Paramount Pictures, Inc.,* 95 F. Supp. 446 (D. Utah 1950), characterized the decree as a "stop gap" measure, or as a "trial" decree since it reserved to the United States the right to proceed and seek final relief at the end of the trial period. In accord: *Twentieth Century Fox Film Corporation v. Brookside Theatre Corporation,* 194 F. 2d 846 (8th Cir.), *cert. denied,* 343 U. S. 942 (1952); *Leonia Amusement Corporation v. Loew's, Inc.,* 117 F. Supp. 747 (S. D. N. Y. 1953). A related problem occurred with respect to consent decrees which reserved to the Court continuing jurisdiction. In general, treble damages plaintiffs were unsuccessful in arguing that the retention of jurisdiction meant that the action continued to pend. See *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F. 2d 284 (7th Cir. 1956); *Tague v. Balaban,* 146 F. Supp. 356 (N. D. Ill. 1956); *Barnett v. Warner Bros. Pictures Distributing Corp.,* 112 F. Supp. 5 (N. D. Ill. 1953).

Sun Theatre decision. Starting from the premise that the tolling provision was designed to protect the prima facie provision, the Seventh Circuit held that a Government suit ceases to pend as to a particular defendant when the litigation is terminated as to him. The Court indicated that no purpose is served by continuing to toll the statute under § 5 (b) once a final judgment or decree is entered with respect to any one defendant, which plaintiff may thereafter use as prima facie evidence pursuant to § 5 (a). The current validity of *Sun Theatre,* its predecessors and its progeny is challenged by plaintiffs primarily on the basis of *3M* and *Leh v. General Petroleum Corporation,* 382 U. S. 54 (1965), [hereinafter cited as *Leh*]. Their contention is that these cases destroy the rationale of *Sun Theatre* and similar holdings, based as they are on the view that §§ 5 (a) and 5 (b) are coextensive.

In holding that an F. T. C. proceeding tolls the statute under § 5 (b), the Court in *3M* noted distinctions between the express language of §§ 5 (a) and 5 (b), as well as differences in the congressional policies underlying the two sections. These differences were reiterated in *Leh,* in which the issue was whether the plaintiff's treble damage suit was "based in whole or in part on any matter complained of" in a prior Government action, within the meaning of § 5 (b). Refusing to accept the view that § 5 (b) is circumscribed by collateral estoppel principles applicable to § 5 (a), the Court in *Leh* adopted a broad construction of the tolling section and held that "the private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants" as in the Government action in order to obtain the benefit of § 5 (b). 382 U. S. at 59. While neither *Leh* and *3M* was directly concerned with the "pendency" language of § 5 (b), this Court is of the opinion that they so weaken the foundation of the *Sun Theatre* line of cases that these decisions must be rejected as obsolete.

In *3M* the Supreme Court contradicted the opinion of the Seventh Circuit, expressed in *Sun Theatre,* that the tolling provision had no further purpose to serve once a judgment or decree is available which the private plaintiff may use as prima facie evidence. Thus, *3M* points out that the private litigant may receive invaluable aid from the pleadings, transcript, exhibits and documents in the Government suit, apart from the prima facie effect, if any, of these materials. Even though one defendant in the Government lawsuit may capitulate before his companions, it is quite reasonable to assume that as the proceedings continue, that defendant will be referred to in subsequent testimony, documents and exhibits. This will be particularly true where, as here, the Government's suit is based on an alleged conspiracy. Moreover, under the *Sun Theatre* view, § 5(b) would have no useful function whatsoever where the private plaintiff is prohibited from using a consent decree as prima facie evidence under § 5 (a) because it was entered before any testimony was taken. In addition, the important questions of law which the Supreme Court suggested might be resolved in the Government suit may not be raised or determined until after the action becomes inactive with respect to a particular defendant. If the private plaintiff must bring his lawsuit before the entire Government litigation has terminated, he may be without the guidance of a decision on a relevant matter.

Differences in the language of §§ 5 (a) and 5 (b) also lend some support to the conclusion that the Government proceedings continue to pend as to each defendant until the entire action is terminated. The former section states that a final judgment or decree in the Government action "to the effect that a defendant has violated" the antitrust laws "shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant. . . ." In addition to the absence of a reference to final judgment or decree in § 5 (b), as the

Court observed in *3M*, that section does not provide for tolling the statute against "a defendant" or against "such defendant." Quoting from *Union Carbide & Carbon Corporation v. Nisley*, 300 F. 2d 561, 569 (1962), the Court in *3M* indicated:

> "* * * The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." 381 U. S. at 318.[10]

Under § 5 (a), a due process question may be raised if the actions of one defendant are allowed to bind another. Therefore, that provision speaks in terms of estoppel. Estoppel is not an issue under § 5 (b), since Congress "was not then dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third." 381 U. S. at 317. While it may be a hardship for one defendant to have the threat of treble damage suits lurking in the wings until the Government action plays itself out against all defendants, no due process issue is raised thereby. Granted that antitrust actions are notoriously protracted, and that the construction of § 5 (b) adopted herein may result in a defendant being sued several years after the Government action has been completed for him, yet would this defendant have standing to complain if Congress had adopted, say a ten year statute of limitations with no tolling provision? I think not.

The phraseology of § 5 (a) is distinct from 5 (b) in still another respect. In the former provision Congress extended

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[10] Defendants suggest that since the Supreme Court cited and quoted with approval this language from the *Union Carbide* case, it also approved the holding in that case that tolling must be approached on a defendant-by-defendant basis. On the other hand defendants repeatedly point out that *3M* was not concerned with the questions presented here. Therefore, it cannot be assumed or implied that *3M* approved the result reached in *Union Carbide* respecting those issues pertinent here which were not raised in *3M*.

an incentive to defendants to enter into consent decrees by exempting such decrees, when entered before any testimony is taken, from the prima facie effect of § 5 (a). By contrast, § 5 (b) is silent with respect to the effect of a consent decree on the statute of limitations. In amending the Clayton Act in 1955, Congress had before it the Report of the Attorney General's National Committee to Study the Antitrust Laws. Although several proposals of that Committee were adopted, Congress did not accept the Committee's recommendation that suspension of the period of limitations under § 5 (b) terminate with respect to a consenting defendant at the time the decree is entered.[11] Plaintiffs argue that to accept the approach urged by International and Carey would have the effect of inserting into § 5 (b) the very recommendation which Congress bypassed. Defendants retaliate by arguing that since *Sun Theatre* and similar holdings were handed down prior to the 1955 amendments, and were not changed thereby, Congress impliedly approved the construction given to § 5 (b) by these cases.

Neither argument is persuasive. The result reached herein finds its support not so much in canons of construction, or even explicit legislative history, but rather has its roots in the overall policy underlying § 5 (b) and in the expansive interpretation placed on that section by the Supreme Court in *Leh* and *3M*. As the Court indicated in *Burnett v. New York Central R. Co.*, 380 U. S. 424, 427 (1965), and reiterated in *3M*, whether a statute of limitations should be tolled in a given instance depends upon whether a Congressional purpose is served thereby. The overrid-

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[11] Recommendation 2C of the committee suggested that:

"The suspension period should, as to any defendant against whom a suspension is claimed, extend from the commencement or reopening of the proceeding to (1) the entry of the nolo or consent decree against defendant, or (2) the date of other final action by the highest court acting in the matter."

Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).

ing purpose of the Clayton Act's tolling provision, as enunciated in *3M*, is "to assist private litigants in utilizing any benefits they might cull from government antitrust actions." 381 U. S. at 317. According to the dictates of *Leh*, "effect must be given to the broad terms of the statute itself," giving consideration to Congressional opinion "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." 382 U. S. at 59. A holding that the Government salt litigation continued to pend with respect to each defendant, until it was concluded for all of them, gives effect to the purpose of § 5 (b) and promotes private antitrust litigation.

In framing the tolling provision, Congress undoubtedly was cognizant that private treble damage suits usually follow a successful Government action.[12] To allow the private plaintiff sufficient time "to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint,"[13] Congress suspended the period of limitations not only during the pendency of the Government action, but also for one year thereafter. An intelligent evaluation of the Government's case can only be made at the conclusion of the entire law suit. Before the Government litigation is entirely concluded, the private plaintiff may not be in a position to assess the strength of his case against a particular defendant, or even to formulate a complaint. In addition, during the pendency of the Government litigation, transcripts, documents and exhibits may not be readily avail-

[12] In Neal & Goldberg, *supra*, note 1, at 622, the authors list 1,880 private suits commenced since the Government electrical industry lawsuits began in 1960 up until 1963. They also estimate that the Government litigation against the motion picture industry prompted at least 1,000 private cases from 1946 to 1959. Conant, *supra*, note 7 at 178 lists some 381 private cases from 1951 to 1959.

[13] S. Rep. No. 619, 84th Cong., 1st Sess. (1955).

able to him. Or it may result that after studying the Government's case a private plaintiff will decide that he has no claim against a defendant for whom the Government litigation had an early termination. Another concern of Congress in passing § 5 (b) was to share the greater resources of the Federal government with the private plaintiff of small means. If the Government lawsuit terminates on varying dates for each defendant, the individual plaintiff may be forced to start several different lawsuits, which could drain his resources. Although the rules would permit that plaintiff to move for a continuance and a consolidated trial once he has a lawsuit instituted against each defendant, since such motions are addressed to the Court's discretion, the private plaintiff may still be required to prosecute several different lawsuits, which may be financially impossible. To avoid these difficulties, and to give the private plaintiff the maximum assistance which can be culled from the Government action, it must be concluded that the Government litigation continues to pend against each defendant until concluded as to all.[14]

(2) *Morton and Diamond*—Much of the above discussion also supports the conclusion, contrary to the position of Morton and Diamond, that the Government actions which germinated these cases continued to pend until affirmed by the Supreme Court on October 26, 1965. Based on the Congressional desire to prevent stale actions—an expressed purpose of the four year Federal limitation period—[14a] these defendants argue that plaintiffs may not tack together two Government proceedings to prolong the suspension until the last action has been completed.

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[14] Although it is not a relevant factor for determining the intended scope of §5 (b), the handling of consolidated private actions such as these will be facilitated by a single termination date for all Government defendants.

[14a] See note 15, *infra*.

The Government litigation with which we are here concerned consists of a criminal prosecution commenced on June 28, 1961, and a civil action commenced on July 11, 1961. Heretofore, no reported case has dealt with this precise factual situation with reference to § 5 (b). Analogous situations were presented in *Union Carbide & Carbon Corporation v. Nisley,* 300 F. 2d 561 (10th Cir. 1961) and *Dickinson, Inc. v. Kansas City Star Company,* 173 F. Supp. 423 (W. D. Mo. 1959). In the *Nisley* case the Government's antitrust prosecution began with an indictment filed in June, 1946. In September, 1948, that indictment was dismissed, but on the same date an information was filed charging the same defendants with the identical conspiracy. Thereafter, the action proceeded under the information and was finally concluded on June 2, 1957. Within one year thereafter, in 1958, treble damage actions were commenced against the Government defendants. Raising the statute of limitations defense, they argued that the Government suit ceased to pend when the indictment was dismissed in September, 1948. With little discussion of the issue, the Court held the Government action continued to pend from the time the indictment was filed in 1946 until the action on the information terminated in 1957. Distinguishing the *Nisley* case, defendants herein point out that dismissal of the indictment and filing of the information were simultaneous so that, in essence, there was merely a technical amendment. It is defendants' position that *Nisley* involved only one proceeding and not two.

More approximate to the present situation is the *Dickinson* case which involved both a civil and criminal proceeding. But unlike the present situation, the indictment and complaint were filed simultaneously on January 7, 1950. Guilty verdicts were entered in the criminal action, which ceased to pend on June 17, 1957. Less than six months later, on November 15, 1957, the civil action terminated by consent decrees. At issue in the private

treble damage action was whether plaintiffs could use the guilty verdicts as prima facie evidence under § 5 (a). Defendants argued that since the private action was not commenced within one year after termination of the criminal proceeding, the guilty verdicts could have no prima facie effect under § 5 (a). However, defendants conceded that plaintiffs' cause of action was not barred, thereby recognizing that § 5 (b)'s suspension continued throughout both proceedings. This view of the tolling provision was also adopted by the Court, which reasoned that if the period of limitations is suspended for the duration of both Government proceedings, the prima facie effect of a judgment or decree in the first action must be viable throughout both. The Court's conclusion rested in part on a presumed congressional intent, which was expressed as follows:

> "When Congress enacted the evidentiary and tolling provisions of Section 5, supra, it is manifest that they (sic) made the provisions thereof applicable to both criminal and civil actions brought by the Government. The only assumption to be made therefrom is that the Congress knew that in some instances both such types of actions would be commenced simultaneously by the Government—one to punish for past violations of the Anti-Trust Laws and the other to prevent future violations in respect to an identical plan or scheme of violation. There is no legislative history of Section 4 or 5 of the Clayton Act from which it may be inferred that the Congress intended the evidentiary or tolling provisions in question to be made applicable only to the first action terminated, where they were concurrently so brought." 173 F. Supp. at 425.

Since Congress must have been well aware of the Justice Department's authority to bring both civil and criminal actions, the *Dickinson* analysis seems reasonable and logical.

Therefore, this Court is of the opinion that the statute remains tolled on the causes of action asserted herein through October 25, 1966, one year after the Government civil action ceased to pend on October 26, 1965.

Defendants have argued that Congress did not intend to toll the statute throughout *successive* actions. For this position there is support in the *Dickinson* opinion, in which the Court intimated that the limitation period of successive Government actions may not be joined together to prolong the suspension under § 5 (b). It may be that in some instances tolling the statute during successive actions would result in treble damage claims of such vintage that it would be patently unreasonable to assume that Congress meant to allow "tacking" under § 5 (b). But here, the civil complaint was filed within two weeks of the indictment. Although not simultaneously commenced, the two actions were pending concurrently. I think this situation falls within permissible limits so that the suspension could continue until the conclusion of the civil suit.

This construction, in defendants' view, tends to frustrate congressional policy against procrastination of private actions. In a Senate Report relating to the 1955 Amendments the Congress expressed concern over prolongation of stale claims, undue impairment of efficient business operations and overburdening of Court calendars.[15] Tacking

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[15] In Senate Report Number 619, 84th Congress, 1st Session, the Committee stated that:

> ". . . in many instances the long duration if such [government proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.
>
> "While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust ac-

together the Government actions involved here has these vices, so defendants argue. In the Senate Report just mentioned, the legislators referred to protracted Government proceedings plus a lengthy statute of limitations. To prevent the adverse effects of such a scheme, Congress gave private litigants only one year following termination of the Government proceedings to institute their actions. Nothing in the statute attempts to shorten Government proceedings. On the contrary, the Congressional Committee felt it "highly desirable" to suspend the limitation during the Government proceedings. It would seem, then, that the short period of one year serves to prevent stale claims and the other disadvantages noted by the committee report.

Because the Government civil action here produced no new testimony, being submitted on the record made in the criminal case, defendants maintain that the fruits of the Government action were available to plaintiffs following completion of the criminal case. It is suggested that they could well have initiated their review and assessment of the Government case and their respective claims during the year following termination of the criminal action. This argument suffers from hindsight to the extent that private plaintiffs may not have been aware that the civil action would produce little else in the way of discovery, documents, testimony or exhibits. Additionally, questions may have been raised in the civil suit which had not been previously determined by the criminal action. If this were so, then the private actions could conceivably progress at a faster pace.

Defendants also claim prejudice, emphasizing that private plaintiffs are under no obligations to preserve records

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tion and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit."

during the pendency of Government proceedings. Thus, it is asserted that discovery will be impaired. The purpose of a period of limitations was summarized in *Burnett v. New York Central R. Co.*, 380 U. S. 424, 428 (1965), as follows:

> "Statute of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U. S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."
>
> "This policy of repose, designed to protect defendants is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

These purposes are not undermined by suspending the statute during the two proceedings here. When Government suits are initiated, defendants thereby receive notice that private treble damage actions may, and most likely will, follow thereafter. During this time potential plaintiffs will realize that it is to their advantage to retain records, since they will have the burden of proving their case. As defendants herein seem to acknowledge, their own records will be preserved and utilized during the defense of the Government action. Finally, because Congress has taken the position that private treble damage suits constitute a formidable means of enforcing the antitrust laws, the protection

for defendants embodies in statutes of limitations is outweighed in this setting by the interest in assisting treble damage plaintiffs to vindicate their own, as well as the public, interest. Taking these factors into consideration, as well as those heretofore mentioned, the Government action continued to pend until October 26, 1965, and the statute remains tolled for one year thereafter. Since the last day for filing suit will be October 25, 1966, all of the instant cases were timely brought.

(3) *Non-Government Defendants*—The question of when the Government proceedings terminated as to defendants in these cases who were not parties to the Government action must be deferred until it is ascertained whether § 5 (b) has any application to such defendants, which is the next problem to be resolved.

C. *Defendants Covered by § 5 (b)*—

Among the many defendants in these cases are several who were not parties to the Government proceedings, although most of this group were specifically named as coconspirators.[16] These defendants maintain that § 5 (b) does not operate to toll the statute against them, citing a block of movie theatre cases holding that this section cannot be applied to non-Government defendants.[17] Again

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[16] Defendants who were named coconspirators by the United States but not defendants are American, Barton, Hardy, Cutler-Magner and Cargill. Those who were neither defendants nor named coconspirators in the Government case include Cargo Carriers, Dow and Gunther. The latter is involved in the Missouri treble damage case, but has not yet been transferred to this Court. Dow is named by Michigan plaintiffs as a coconspirator, but not as a defendant. Originally the Iowa plaintiffs named Dow as a defendant, but immediately dismissed it from the action.

[17] See, *e.g.*, *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 283 (7th Cir. 1954); *Momand v. Universal Film Exchange, Inc.*, 172 F. 2d 37 (1st Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Court Degraw Theatre, Inc. v. Loew's, Inc.*, 172 F. Supp. 198 (E. D. N. Y. 1959); *Charles Rubenstein, Inc. v. Columbia Pictures Corporation*, 154 F. Supp. 216 (D. Minn. 1957), *aff'd* 289

relying on *3M* and *Leh*, plaintiffs assert that the cases cited by defendants are no longer controlling.

In neither case was the Supreme Court squarely presented with this issue. The only non-Commission defendant involved in *3M* was not a party to the Supreme Court appeal, having successfully contended in the District Court that § 5 (b), even if tolled by Commission proceedings, did not cover non-defendants. In *Leh*, the sole non-Government Court passed upon the tolling issue and therefore was not a party to the Supreme Court review. Even though neither decision explicitly passed upon the question raised here, the broad interpretation given § 5 (b) in *Leh* and *3M* suggests that the Supreme Court would hold that it tolls the statute on a cause of action asserted against a non-Government defendant; therefore, that interpretation is hereby adopted.

The treble damage action in *Leh* was brought against six of eight Government defendants, as well as a party not named in the Government litigation. As noted, the non-Government defendant was no longer in the case when it reached the Supreme Court. Defendants raised the statute of limitations as a bar to the action, to which plaintiffs replied that the Clayton Act operated to suspend the statute. Application of § 5 (b) was resisted by defendants on the ground that the private claims were not based in whole or in part on the matters complained of in the Government suit since different overt acts were alleged, involving different parties, time periods, and geographic areas. "The lower Courts found that plaintiffs' complaint was not based in whole or in part on

F. 2d 418 (8th Cir. 1961); *Samuel Goldwyn Prod., Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Calif. 1956); *Electric Theatre Co. v. Twentieth Century Fox Film Corp.*, 113 F. Supp. 937 (W. D. Mo. 1953); *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1951). Most of these cases involve subsidiaries of, or successors to, named Government defendants.

any matter complained of principally because of the differences in the defendants named in the two suits and in the period of the conspiracies alleged." 382 U. S. at 62. Taking the view that these differences do not alter the effectiveness of § 5 (b), the Supreme Court reversed, and held that § 5 (b) may be invoked where there is "substantial identity" between the private complaint and the Government's allegations. In so holding, the Court rejected the restricted view of § 5 (b) adopted in *Steiner v. 20th Century Fox Film Corporation*, 232 F. 2d 190 (9th Cir. 1956), which approached § 5 (b) in terms of the collateral estoppel principles applicable to § 5 (a). The Court stated, "[T]he private plaintiff is not required to allege that the same means were used to achieve the same objectives of the same conspiracies by the same defendants. . . ." 382 U. S. at 59.

As indicated, the private defendants in *Leh* included some, but not all, of the Government defendants. At the very least then, *Leh* stands for this proposition: Section 5 (b) may be applied to one Government defendant in a private action without regard to the absence of other Government defendants. Another analysis of *Leh* is suggested by this reference to *3M*:

> "The action upon which plaintiff relied as suspending the running of limitations was a Federal Trade Commission proceeding under § 7 against Minnesota Mining but not against Essex. Essex was not a party to the interlocutory appeal in the private action and no contention was made here that the difference in parties prevented tolling of limitations as to Minnesota Mining." 382 U. S. at 63.

Reading *Leh* in light of this passage, it can be interpreted thus: Section 5 (b) may be applied to a Government defendant in a private action despite the presence of a non-Government defendant. In sum, *Leh* teaches

that a private cause of action may stem from prior Government litigation even though there is lacking complete identity between the defendants named by the Government and those named by the private litigant. The Court stated:

> "[W]e cannot conclude that private claimant may invoke § 5 (b) only if the conspiracy of which he complains has the same breadth and scope in time and participants as the conspiracy described in the government action on which he relies." 382 U. S. at 63.

If, then, a treble damage plaintiff can meet the "substantial identity" test even though his cause of action does not include the same participants as those described in the Government complaint, a third proposition can be distilled from *Leh*: Section 5 (b) may be applied to suspend the period of limitations against a private defendant, notwithstanding the fact that he was neither a party to, nor a named co-conspirator in the Government action.

While recognizing that *Leh* did not result in the application of § 5 (b) to any non-Government defendant, this interpretation is nonetheless consonant with the Court's admonition that "effect must be given to the broad terms of the statute itself. . . ." Section 5 (b) tolls the statute on every private right of action, and requires only that the claim be based in whole or in part on the matters complained of in the Government litigation. On its face, that section is not concerned with the defendants against whom the limitations period may be tolled. Rather, the focus is upon the potential plaintiff—the statute on every private right of action is tolled. The movie theatre cases cited by defendants interpolated into § 5 (b) the language of § 5 (a) which refers to defendants, and to estoppel between parties. The rationale and interpretative approach

to these decisions is inconsistent with the Supreme Court's approach in *Leh*, which holds that the matters complained of in the two actions need only have a substantial similarity, and not such an identity as would result in an estoppel between the parties to the Government action. Further, *Leh* implies that any difference in the defendants named in the two actions may often be unrelated to the question of whether the private claim is based in part on the Government suit. The Court stated:

> "In suits of this kind the absence of complete identity [between defendants] may be explained on several grounds unrelated to the question of whether the private claimants' suit is based on matters of which the Government complained. In the interim between the filing of the two actions it may become apparent that a party named as a defendant by the Government was in fact not a party to the antitrust violation alleged. Or the private plaintiff may prefer to limit his suit to the defendants named by the Government whose activities contributed most directly to the injury of which he complains. *On the other hand, some of the conspirators whose activities injured the private claimant may have been too low in the conspiracy to be selected as named defendants or coconspirators in the Government's necessarily broader net.*" 382 U. S. at 63-64. (Emphasis added.)

Thus the Court acknowledged that a private plaintiff may well name as defendants persons who were "too low in the conspiracy" to be included as named defendants, or even named conspirators, in the Government suit. Further, it implies that the mere fortuity that a defendant who allegedly injured the private claimant did not gain a place in the Government litigation is not a controlling factor in determining whether the private claim-

ant has met the substantial identity test.[18] Based on this analysis of *Leh*; the Court's apparent desire to give private litigants every benefit they might cull from the Government litigation; as well as those factors previously mentioned, I conclude that § 5 (b) may be applied to non-Government defendants. In addition, it should be noted that the passage just quoted lends some support to the view that no distinction need be made between private defendants named as coconspirators by the Government and those who were not named. As the Court suggested, this, too, depends upon the strategy adopted by the Government which has no bearing on the private plaintiff's compliance with the substantial identity test.

Among the objections voiced by the non-Government defendants here is that this construction of § 5 (b) penalizes them for the actions of named Government defendants over whom they have no control. In the context of the present cases, it is argued that these defendants could not prevent prolongation of the Government actions by Morton and Diamond, who contested the actions throughout, including a Supreme Court appeal. Allusions have been made to the due process clause, as well as to the "right" of non-Government defendants to rely upon the four year statute of limitations. As noted above, one gains no vested right to a particular limitations period, perhaps with the exception of the situation where an attempt is made to revive a barred

[18] In *Leh* the Court tested the plaintiffs' complaint with respect to the type of conspiracy alleged; the parties involved; the time period covered; and the geographic area of impact, comparing all of these factors with the Government complaint. However, no suggestion was made that, to comply with the substantial identity test, the private claim must overlap with the Government allegations in each of these areas. Therefore, it is conceivable that a private cause of action could be based in part on a Government litigation with reference to the conspiracy, time period, and area, even though none of the private defendants were parties to that proceeding.